STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION

INFOTELECOM, LLC Complainant, v. ILLINOIS BELL TELEPHONE COMPANY D/B/A AT&T ILLINOIS Defendant.	)	Docket No. 11-0597

INFOTELECOM'S REPLY IN SUPPORT OF MOTION TO SUSPEND SCHEDULE

Infotelecom, LLC ("Infotelecom"), by and through counsel, hereby submits this Reply in Support of its Motion to Suspend the Schedule Pending a Decision by the Second Circuit in a Related Case (the "Motion"). Illinois Bell Telephone Company ("AT&T Illinois") provides no basis for its request that the Commission ignore the clear import of the Second Circuit's September 9, 2011 injunction order. Infotelecom's motion should be granted.

AT&T Illinois' opposition tries mightily to mischaracterize the natural import of the Second Circuit's Order in an effort to dissuade the Commission from granting Infotelecom's motion and in an obvious effort to prejudice Infotelecom. Lest there be any doubt, Infotelecom's motion for a stay pending appeal asks the Second Circuit to maintain the *status quo* while that court evaluates whether the district court erred in dismissing Infotelecom's complaint for declaratory relief regarding the appropriate interpretation of the disputed escrow provision. The purpose of such a stay would not simply be to prevent the AT&T ILECs from terminating Infotelecom's ICA and disconnecting service to Infotelecom, as AT&T Illinois suggests, but

rather to maintain the *status quo* in its entirety. The reason that Infotelecom sought this relief from the Second Circuit is because, if it is forced to expend considerable sums litigating this issue before six different state Commissions, and if those Commissions act before the Second Circuit completes its analysis, the legal issues giving rise to the appeal may become moot.

Contrary to AT&T's arguments, the legal issues in the appeal now before the Second Circuit are significant and would be dispositive of whether this Commission should ultimately resolve the issues raised in this proceeding. Despite AT&T's representations to the contrary, the legal question of whether a federal court has original jurisdiction to resolve post-formation ICA disputes has never been definitely resolved and is far from settled.

Indeed, there is a split of authority, no dispositive decision of the Second Circuit, and authority from the FCC that strongly supports Infotelecom's position that the district court erred when it dismissed Infotelecom's post-formation ICA dispute. On the issue of whether there is original federal court jurisdiction under 28 U.S.C. § 1331 and 47 U.S.C. §§ 206 & 207 over a post-formation ICA dispute, the district court relied on *Law Offices of Curtis V. Trinko, LLP v. Bell Atlantic Corp.*, 305 F.3d 89, 98 (2d Cir. 2002), *rev'd on other grounds*, 540 U.S. 398 (2004). The AT&T ILECs never cited that case in their motion to dismiss (or in their reply brief), and, therefore, Infotelecom never had the opportunity to provide any meaningful argument against the conclusions in that case. In fact, counsel for the AT&T ILECs conceded during oral argument that they had not raised the case before that district court and that "if we thought we had a good Second Circuit decision on that, we would cite it…." *See* Ex. 1, Transcript Excerpts from the July 12, 2011 Hearing, at 9.

As Infotelecom explained to the Second Circuit in its motion for a stay pending appeal, had it been provided the opportunity to do so, Infotelecom would have argued against the

application of *Trinko* on the grounds that the very analysis that the district court relied upon in dismissing Infotelecom's ICA claims was rejected by the FCC. Specifically, after concluding that the breach of an interconnection agreement "constitutes a violation of both 47 U.S.C. § 251(c)(2)(D) and 47 C.F.R. § 51.305(a)(5)," sufficient to give rise to a cause of action within the Commission's jurisdiction, the FCC turned to address the Second Circuit's decision in *Trinko*. The FCC stated:

> Finally, although Verizon does not cite it, we note that the United States Court of Appeals for the Second Circuit recently issued an opinion considering whether, under the particular circumstances at issue, an alleged breach of an interconnection agreement constituted an alleged violation of section 251 of the Act. In *Trinko v. Bell Atlantic Corp.*, a divided panel concluded, over a vigorous dissent, "that in this case it does not." *Trinko* does not undermine our conclusion here, however. ***Trinko* implies that an incumbent LEC has no obligation under the Communications Act to comply with an interconnection agreement; thus, an incumbent LEC's obligations would flow solely from contract law** enforceable only in a court. In the case of interconnection, **this conclusion conflicts with express statutory language obligating incumbent LECs to provide interconnection "in accordance with the terms and conditions of the agreement."** 47 U.S.C. § 251(c)(2)(D).

Core Comm'cns, Inc. v. Verizon Md., Inc., FCC 03-96, Mem. Op. & Order, 18 FCC Rcd. 7962, 7973, ¶ 28 (2003) (emphasis added). And, because a court must defer to the FCC's analysis, *see Nat'l Cable & Telecomms. Assoc. v. Brand X Internet Serv.*, 545 U.S. 967, 982-86 (2005), the inescapable conclusion is that allegations regarding a breach of an ICA do give rise to federal question jurisdiction and Infotelecom is entitled to have this dispute resolved uniformly by the federal court, rather than proceeding with the piecemeal resolution that AT&T is attempting to require of Infotelecom.

In addition, the Fourth Circuit has agreed with Infotelecom, holding that a breach of an interconnection agreement that implements a duty imposed by the Telecommunications Act arises under federal law. *See, e.g., Verizon Md., Inc. v. Global NAPs, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004)*; Central Tel. Co. of Va. v. Sprint Commc'ns Co. of Va.*, 759 F. Supp. 2d 772, 777

(E.D. Va. 2011). Thus, in the absence of dispositive precedent in the Second Circuit, and the plain meaning of the FCC's decision in *Core*, Infotelecom demonstrated to the satisfaction of at least one judge of the Second Circuit Court of Appeals that it has a significant probability of success on appeal that warrants maintaining the *status quo* so that Infotelecom's claims will not become moot during the pendency of that appeal. While the decision to maintain the current injunction will be evaluated in the near-term by a three judge panel at the Second Circuit, it is fair to say that there has been an initial determination that Infotelecom's motion has sufficient merit such that the Second Circuit does not want its ability to fully address the open legal questions to be rendered moot by AT&T's threats to improperly disconnect service and terminate the ICA in the interim.

At present, all that Infotelecom seeks is a brief suspension of the schedule. It is true that if the Second Circuit extends its injunction and concludes that the *status quo* should be maintained through the duration of the appeal, Infotelecom will ask that the Commission honor that Second Circuit's order, precisely because that order will be directed at preventing this and other state commissions from rendering the Second Circuit incapable of resolving the legal issues in that appeal. But, the parties and the Commission should cross that bridge when and if we get there.[1]

In the interim, the Commission needs to only decide how much credence it will give to AT&T Illinois' argument that the brief delay requested by Infotelecom will somehow damage

[1] AT&T Illinois does not suggest (and nor could it) that if the Second Circuit's motion panel agrees with Infotelecom and extends the stay pending appeal that it would be entitled to ignore that decision and proceed to terminate Infotelecom if this Commission subsequently determined that AT&T Illinois is entitled to obtain the escrow payments sought by AT&T Illinois. In other words, AT&T Illinois asks the Commission to expend considerable time and resources to issue what may ultimately be an "advisory" opinion that provides no legal rights to AT&T Illinois. Such a course of action is a waste of both the Commission and the parties' resources.

AT&T Illinois' interests so significantly as to warrant ignoring the Second Circuit's current injunction. Here, Infotelecom respectfully submits that AT&T Illinois's argument is lacking. Under AT&T Illinois' view of the world, AT&T Illinois slumbered on its ability to demand escrow payments for nearly two years, AT&T Opp. at 3, but nevertheless argues that it cannot now withstand even the brief four to five week delay requested by Infotelecom. This argument rings hollow. AT&T Illinois also suggests that Infotelecom seeks delay for delay's sake. But, this is not true. Infotelecom's actions have consistently sought to accomplish two interrelated objectives: (1) prevent the AT&T ILECs for unlawfully terminating the ICA and disconnecting Infotelecom's service, which the AT&T ILECs have repeatedly threatened to do, rather than seeking this or any other Commission's intervention; and (2) avoid having the AT&T ILECS use their substantial resources to spend Infotelecom into submission by needlessly creating duplicative and conflicting proceedings. Neither of these objectives undermine AT&T Illinois' legal rights nor present any immediate and irreparable harm to it.

Infotelecom, therefore, respectfully requests that the Commission grant the brief suspension of the schedule requested by Infotelecom's motion.

Respectfully submitted,

s/ Thomas H. Rowland
Thomas H. Rowland
Stephen J. Moore
Rowland & Moore LLP
200 W. Superior St., Suite 400
Chicago, IL 60654
312-803-1000 Ex 31
tom@telecomreg.com
steve@telecomreg.com

Ross A. Buntrock
G. David Carter
Jason A. Koslofsky
Arent Fox LLP
1050 Connecticut Ave, N.W.
Washington, DC 20036-5339
Tel: (202) 857-6029
Fax: (202) 261-0035
Buntrock.ross@arentfox.com
Carter.david@arentfox.com
Koslofsky.jason@arentfox.com

Counsel for Infotelecom, LLC

CERTIFICATE OF SERVICE

I, Thomas H. Rowland, do hereby certify that I have, on this 21st day of September 2011, caused to be served upon the individuals listed on the service list maintained by the Illinois Commerce Commission, by e-mail and/or U.S. Mail, a copy of the foregoing pleading on behalf of Infotelecom, LLC in Docket 11-0597.

s/ Thomas H. Rowland
Thomas H. Rowland
Rowland & Moore LLP

Counsel for Infotelecom, LLC